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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 382

IN THE MATTER OF

THIRD AVENUE TRANSIT CORPORATION, ET AL.,
Debtors.

In Proceedings for the Reorganization of Corporations Pursuant to Chapter X of the Bankruptcy Act.

HIRAM S. GANS,
Petitioner,

v.

SURFACE TRANSIT INC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 4, 1959.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays for the issuance of a writ of certiorari to review the final order and judgment of the United States Court of Appeals for the Second Circuit dated and entered on May 11, 1959.

Opinions Below

The opinion of the Court of Appeals is reported at 266 F. 2d 862. The portions thereof applicable to the petitioner (266 F. 2d 862, 867-8) are annexed hereto. The opinion of the United States District Court on petitioner's application is reported at 159 F. Supp. 440 and appears in the Appendix printed for and certified by the Court of Appeals and submitted herewith (App. 141 *).

Jurisdiction

The jurisdiction of the Supreme Court is invoked under 11 U. S. C. § 75(c), 28 U. S. C. 1254(1) and Supreme Court Rule 19 (1)(b).

Section 102 of the Bankruptcy Act (11 U. S. C. § 502) provides that Chapters 1 through 7 of the Bankruptcy Act, as amended, and where not inconsistent, apply to reorganizations under Chapter X of the Bankruptcy Act. Consequently, Section 47(c) of the Bankruptcy Act (11 U. S. C. § 75(c)) part of Chapter 4, which is not inconsistent with Chapter X, applies.

> "§ 47. Jurisdiction of appellate courts
>
> • • •
>
> "(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. July 1, 1898, c. 541, § 24, 30 Stat. 553; May 27, 1926, c. 406, § 9, 44 Stat. 664; June 7, 1934, c. 426, 48 Stat.

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* References to Appendix (App.) herein are to the "Appendix to Brief of Appellant Gans" printed for the Court of Appeals and served on all necessary parties at that time. As so printed and certified it is submitted and filed herewith pursuant to Supreme Court Rule 21(4).

926; June 22, 1938, c. 575, § 1, 52 Stat. 854; June 25, 1948, c. 646, § 39, 62 Stat. 992; July 7, 1952, c. 579, § 9, 66 Stat. 423."

The final judgment sought to be reviewed was dated and entered May 11, 1959, by the Court of Appeals in proceedings for the reorganization of corporations pursuant to Chapter X of the Bankruptcy Act. The amount in controversy claimed in the application for allowances is $375,000. The said judgment denied petitioner any allowance whatever and is final.

By order dated August 6, 1959, the time to file this petition was extended to and including September 9, 1959.

The application for allowances was made in the name of the law firm of which the petitioner was then a member (App. III, p. 11), but prior to the decision thereon by the United States District Court, petitioner was substituted for and succeeded said firm by stipulation approved by said District Court (App. III).

Questions Presented

This appeal raises the following questions of fundamental importance, never before passed on by this Court:

1. Is not § 249 of the Bankruptcy Act (11 U. S. C. § 649) to be construed and interpreted in the light of the expressed intention of Congress in passing such legislation?

2. Where the District Court has found there was no breach of fiduciary duty and no use or possession of inside knowledge, no dealing in stock or claims of the debtor, but on the contrary exemplary concern for and services rendered to the security holders and parties involved which were the preeminent cause of the successful reorganization and further that the single transaction was in response to the demand of a creditor-pledgee of the securities, is not the

Court required to heed the expressed and specific Congressional intention "to prevent hardship in the unusual case where an exception to this rule might be equitable" (S. Rep. No. 1916, 75 Cong. 3rd Session (1938) p. 738) in connection with Section 249?

3. Have not the decisions below misinterpreted Congress' intention and extended the ban of § 249 unduly and improperly in view of the legislative history and the witnesses' testimony connected with this Section 249? S.E.C. Report on Study and Investigation of Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Parts I-IV (1936-7), Part II, p. 319; Hearings before House Committee on Judiciary on H.R. 8046, 75th Cong. 1st Sess. p. 184; Hearings before Subcommittee of Comm. on Judiciary, U. S. Senate, 75th Cong. 2nd Sess. on H. R. 8046, pp. 124-5; Sen. Rep. No. 1916, 75th Cong. 3rd Sess. (1938) p. 7, 38).

4. Does one involuntary act initiated by a creditor demanding payment, pursuant to which an applicant authorizes the single sale of securities pledged with and in possession of that creditor, absolutely bar compensation to such applicant where the proceeds of the sale are paid directly to the creditor and the sale is made in response to a call for margin, and must the applicant divest himself of all other assets or wait for judgment and execution before he can satisfy the creditor's demand?

Statutes Involved

The principal statute involved in this petition is Section 249 of the Bankruptcy Act, as amended (11 U. S. C. § 649) which reads:

> § 649. Statement of claims or stock acquired or transferred after commencement of proceeding.
>
> Any persons seeking compensation for services ren[illegible]ed or reimbursement for costs and expenses

incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred. July 1, 1898, c. 541, § 249, as added June 22, 1938, c. 575, § 1, 52 Stat. 901.

Also involved are Sections 242(3) (11 U. S. C. § 642(3)), 243 (11 U. S. C. § 643) and 250 (11 U. S. C. § 650) of the Bankruptcy Act, as amended, the first two of which deal respectively with the right of the District Court to grant compensation and the last authorizing appeals in matters of law or fact on applications for allowances and compensation to be heard independently, upon the original papers, by the Court of Appeals.

Statement of the Case

The particular securities involved in this instance were some Adjustment Income Mortgage Bonds of the Third Avenue Railway Company, a predecessor of Third Avenue Transit Corporation, the principal Debtor in the Chapter X reorganization proceedings. As the Securities and Exchange Commission said in its summary of the reports of that Commission on Proposed Plans of Reorganization: "The present Third Avenue company was organized in 1942 by the consolidation of the predecessor parent company and its various subsidiaries operating street railway lines in New York City. The then outstanding Refunding Bonds and Adjustment Bonds remained undisturbed in the consolidation."

Quotations from opinions of the Courts below and of counsel for adversary parties describe the situation clearly.

The Court of Appeals has said (266 F. 2d 862, 864-5):

> "This is the final round in the Chapter X reorganization of the Third Avenue Transit Corporation, a common carrier of passengers, and its subsidiaries instituted by the filing of an involuntary petition on October 25, 1948. The debtor at that time was enmeshed in what seemed to be insoluble problems involving limitations on the fares it could charge, heavy wage demands of its employees, and franchise tax demands of New York City. The parties to this appeal are in near unanimity that the reorganization was unusually successful in achieving a workable solution of these problems and in creating reorganized companies of considerable financial strength. Amidst this genuine glow of success it is indeed difficult for any court or agency dispassionately to evaluate the several applications for compensation filed below. For nearly all the participants richly merit the heartfelt thanks of the court and the public, as well as those of the particular group or interest their efforts may have more directly benefited."

Counsel for Surface Transit, Inc. (the reorganized company) and Fifth Avenue Coach Lines, the Company which acquired the Debtors as part of the reorganization plan, in the hearing before the United States District Court (Record,* pp. 24872-4) said:

> "We believe that counsel for the Brown Committee, or more specifically Mr. Gans, made the greatest single contribution that has been made in the course of these proceedings toward bringing them to their ultimately successful conclusion.
>
> "While it is true that from time to time during the course of the proceedings various persons, other than Mr. Gans, who were active in the proceedings, talked to Mr. McCarthy and other representatives of Fifth Avenue, we think it only fair to state that if it had not been for Mr. Gans' persistent and determined efforts, Fifth Avenue would not be here today.
>
> "This accomplishment of Mr. Gans' was really quite remarkable. Although other persons had urged the participation of Fifth Avenue at an earlier date, it was Mr. Gans who succeeded in convincing Fifth Avenue that it should enter into the proceedings and should, in effect, make a bid for the reorganized company.
>
> "He did this after numerous unsuccessful attempts which would have discouraged most people from persevering.
>
> "In addition to persuading Fifth Avenue to enter into the proceedings with a purchase offer, Mr. Gans worked unsparingly, night after night, during the hectic period following towards the end of May, June and July of last year—your Honor will recall that one plan after another was presented to this Court; that the negotiations were proceeding at a rapid rate; that Public Service Commission hearings were going on and that the hearings before this Court were going on—not quite constantly but very much of the

* Record refers to the stenographic record in the U. S. District Court, submitted to the Court of Appeals.

time during that period, of about two months. Mr. Gans was of the greatest assistance to us at these hearings, and also at the Public Service Commission hearings in this critical and intensively active period.

"We have not considered it necessary for us to take a position in connection with the unfortunate issue raised by the sale in 1951 of certain adjustment bonds owned by Mr. Gans. Counsel for the Securities and Exchange Commission has carefully gone into this matter and they, together with Mr. Gans, and possibly other counsel, will be in a position to advise the Court concerning its determination.

"But we do consider it necessary, however, in the interests of fairness to say that in our opinion the creditors of the debtor corporations in these proceedings owe a very great and a quite unusual debt to the activities of Mr. Gans."

Counsel for the Securities and Exchange Commission said (Record p. 24,979):

"But it is also clear to us that whatever the reason or however it worked out, it was principally Mr. Gans that pulled it off, shall I say, and that actually got Fifth Avenue into the proceeding where they made a formal proposal, from which, of course, there were varying developments which resulted in the joint plan.

"I must state in all honesty and candor that but for the facts that I am going to recite, Mr. Gans would be entitled to a substantial fee out of this estate because the service which he participated in rendering and participated to a principal extent was probably the most significant single contribution to the entire case."

Counsel for the Trustee of the Debtor said (Record p. 21,865):

"Speaking for the Trustee, I wish to welcome this new offer that has been made and to congratulate Mr. Gans in having succeeded where others failed

through his persistence in approaching Omnibus (i.e. Fifth Avenue) through other channels after entrance through the front door was refused."

The District Judge said (159 F. Supp. 440, 443-4):

"This result is nothing short of tragic. I agree with counsel for the S. E. C. who says that Mr. Gans participated to a principal extent in the most significant single contribution to the entire case. It was Mr. Gans who, after others had failed in the attempt, succeeded in interesting Fifth Avenue Coach Company which took over the Third Avenue System and thus made the success of the reorganization possible. I am convinced that such was the claimant's interest in his work for his clients, as distinguished from his interest in his own compensation, that he was completely oblivous to the provisions of section 249, at the time that he sold the bonds. I believe him when he says that he was 'rattled' by the margin call. I can think of no information about the situation which was in his hands at that time which was not available to any security holder. Such inferences as may be drawn would indicate that his connection with the proceedings would have led him to buy rather than sell if he had been of a mind to speculate on inside information. He sold his bonds at about 21 and then proceeded to put in efforts on behalf of the reorganization which pre-eminently, among the efforts of all the others, resulted in the appreciation of the market value of the bonds to about 38.

"Nevertheless Congress, in its wisdom, has tied the hands of the courts. So strong is the public policy against dealings by persons engaged in the reorganization of a corporation in the securities of that corporation that the courts are not allowed to remunerate from the estate one of them who buys or sells any of those securities. No amount of benefit conferred upon the estate by a claimant can be permitted to make up for a single harmless false step taken innocently in a time of stress."

Notwithstanding the foregoing recognition and findings that it was the success of petitioner which made reorganization possible, the Courts below have disregarded the intention of Congress in passing Section 249 of the Bankruptcy Act (11 U. S. C. 649). The proceedings of the Senate Judiciary Committee considering the passage of that very section say (S. Rep. No. 1916, 75th Cong. 3rd Sess. (1938)):

> "DENIAL OF ALLOWANCES FOR BREACH OF DUTY. (Sec. 249, p. 169)—This section of the House Bill denies any compensation out of the estate to persons *who violate their representative or fiduciary capacity* by buying or selling claims or stock of the debtor during the proceedings. *To prevent hardship in the unusual case where an exception to this rule might be equitable, the committee has added a clause giving the judge power to approve or consent to an acquisition or transfer in such exceptional case.* (p. 7.) (Italics supplied.)
>
> "Sec. 249 forbids the granting of allowances to persons acting in a fiduciary or representative capacity who *deal* in securities of the debtor during the pendency of proceedings under this chapter, except as the judge may approve or consent to an acquisition or transfer thereof in an unusual case. This section is in the main a codification of the rule already imposed by the courts in proceedings under Section 77B. (p. 38.)" (Italics supplied.)

The heading of this portion of the Senate Report deals with the denial of allowances for "breach of duty", but in this case the District Court specifically found no duty was breached. The quotation refers to violation of representative or fiduciary capacity by buying or selling claims. The District Court has specifically found no such violation occurred. The foregoing report refers to persons who "deal" in securities. Certainly the single transaction involved in this case, even if mistakenly made to comply with a demand of the creditor with whom the securities were pledged, can hardly be dealing in them.

Congress has affirmatively expressed its intention that Section 249 was worded "to prevent hardship in the unusual case where an exception to *this rule* might be equitable," * * *. (Emphasis ours.) What rule? The rule just recited by the Senate Committee, against "buying or selling claims or stock." The juxtaposition of language above leaves no doubt that that is the meaning and intent of Section 249 as enacted. It does and was intended to grant power to approve or consent to purchases or sales or to an acquisition or transfer in an exceptional case and to prevent hardship in the unusual case where an exception to the rule might be equitable. Before the Subcommittee of the Committee on Judiciary, United States Senate, 75th Congress, 2nd Session, on H. R. 8046, at pages 124-5, Mr. Martin Riger, appearing for the Securities and Exchange Commission, testified that "trading" in securities was the evil sought to be banned.

In testimony before the House Judiciary Committee Mr. Justice Douglas, then chairman of the Securities and Exchange Commission, said that Section 249 was intended to codify the decision of Judge Caffey in *In re Republic Gas Corporation*, 35 F. Supp. 300 (S. D. N. Y. 1936), and the opinion of Judge Coxe in *In re Paramount-Publix Corp.*, 12 F. Supp. 823 (S. D. N. Y. 1935). (Hearings Before House Committee of the Judiciary on H. R. 8046, 75th Cong., 1st Sess., at p. 184 (1937).) In the *Republic Gas* case, compensation was denied to committee members who "traded in the bonds" of the debtor corporation. The Committee members had bought and sold large quantities of the debtor's securities. One member had purchased $100,000 of the bonds and had realized a large profit. Judge Caffey had condemned such "trafficking" and "dealing" in the debtor's bonds by the fiduciaries as "misconduct amount[ing] to a fraud in law." (35 F. Supp. at 305.) In the *Paramount-Publix* reorganization, Judge Coxe had ruled that no allowance would be allowed under Section 77B to "a committee member who, during his period of service, *purchases and sells, or pur-*

chases, for personal gain, securities of the company which he is engaged in trying to reorganize" (12 F. Supp. at 828) (emphasis supplied). One of the claimants who was disqualified had "traded heavily" in the debtor's securities (12 F. Supp. at 831; see also *Id.* at 832). As Justice Douglas testified, *Op. cit., supra*:

> "Now Judge Coxe up in New York in the Paramount case, and Judge Caffey in the Republic Gas case opinions which were handed down in 1935 and 1936, respectively, disallowed compensation to committee members who purchased or sold securities. Now, this provision on page 65 (Sec. 249) is a step toward the codification of that rule, an attempt to make it more uniform."

This isolated transfer, compelled by a creditor, can scarcely be branded as the "trading" which Section 249 was designed to stamp out. This case does not involve the "trafficking" condemned by Judge Caffey, *supra*. The test of "trading", of course, is not merely the volume of sales or purchases, although that may be relevant, but whether, as Judge Coxe aptly put it, the purchase or sale was animated by desire "for personal gain".

In the present case, the District Court expressly found petitioner did not possess any inside information. To quote the Court (App. 145): "I can think of no information about the situation which was in his hands at that time which was not available to any security holder. Such inferences as may be drawn would indicate that his connection with the proceedings would have led him to buy rather than sell if he had been of a mind to speculate on inside information." As the District Judge noted, the bonds were sold in October 1951 at about 21, and as a result of petitioner's efforts the bonds subsequently nearly doubled in value to about 38 (*Ibid.*).

The petitioner participated in the reorganization proceedings from their inception in October 1948 as counsel

for some Adjustment Bondholders and later for the Income Bondholders Committee for said bonds of which Lowell H. Brown was chairman (App. 11, 12, 31, 32). From 1948 to 1956 no plan of reorganization was offered that met with the approval of the District Court, the Securities and Exchange Commission and the Public Service Commission of the State of New York. Finally petitioner succeeded in persuading the Fifth Avenue Coach Lines to make an offer and a plan was proposed by petitioner which led to the reorganization. Fifth Avenue paid $4,881,000 in cash and $9,410,000 market value of its stock and also took over the debtors subject to outstanding mortgages, equipment trust certificates and other obligations which made the total purchase price to the Fifth Avenue approximately $25,000.000. The plan procured by the petitioner enabled the first mortgage bondholders to receive more than $6,000,000 in cash plus more than $8,000,000 in new first mortgage bonds. Adjustment Bondholders were relieved from providing $4,880,000 in cash, which Fifth Avenue provided instead. This Fifth Avenue stock, at the time of the offering of the plan, was paying dividends of about 10% per annum.

During the pendency of the reorganization proceedings, in March 1951, petitioner was faced with very pressing problems relating to the refinancing of mortgages on certain real estate, on which he was obligated (App. 122). He discussed this crisis with the officer of the bank (App. 122) and was referred to a man in the mortgage department (App. 122). The petitioner borrowed certain funds from said bank secured by certain collateral of which $25,000 principal amount of Third Avenue Adjustment Bonds were a part. In October 1951 petitioner had three loans at the bank, made at different times, but considered by the bank to be one loan (App. 113-4). Each note, including the personal loan note, contained a provision that the collateral posted by the petitioner was security for any and all loans of the bank (SEC Exs. 37, 39, 40A, 40B, 41, 48; Gans Ex.

22). One note for $4,200 came due on October 22, 1951 (SEC Ex. 40A); a payment on a second obligation was due nine days later (Gans Ex. 22) and the third note for $13,000 came due November 20 (App. 56, Ex. 40B, 48). At the same time and during this entire period of months the petitioner was under constant pressure to satisfy certain mortgages on which he was obligated (App. 61-4) (Gans Exs. 3-21 inclusive). His efforts to refinance these mortgages were unsuccessful (Gans Exs. 5, 6, 12, 13, 15).

However, in the midst of these crises, as the District Court has found and as the officer of the bank testified, the petitioner received a telephone call to provide additional margin or dispose of some of the collateral pledged with the bank for the loans, which the bank considered one loan (App. 112, 113-4), as aforesaid. The officer of the bank who handled the transaction testified that it was "mandatory" for the bank's request to be attended to by Friday when the officer made his weekly report (App. 128, 130). The call for margin was made on Monday, October 22nd, 1951 (App. 47). Petitioner consequently had to take action immediately if payment was to be made by Friday, since the proceeds of a sale of securities are not received until a delivery date several days after a sale. Moreover, petitioner had no time to arrange any real estate transaction. It is, of course, common knowledge that any such transaction involves title searches, etc. Hindsight appears to have persuaded certain parties that regardless of the stress of the moment due to the foregoing circumstances, the petitioner could have risked selling all the collateral pledged with the bank, excluding the Third Avenue Bonds, and thereby paid off two of the notes, leaving the third note collateralized only by Third Avenue Bonds. This argument is advanced by the courts below, neither of which discusses the third note and the mortgage problems existing at the time notwithstanding the introduction of written exhibits in evidence disclosing the whole situation.

The language of all three notes given by petitioner is so broad as to allow the bank to dispose of securities without notice, without demand, whenever the bank feels "in its absolute and unrestricted discretion" insecure in its position (SEC Ex. 40B et al.). The testimony of the petitioner and the bank officer makes clear that the only security pledged with the bank which was criticized was the Third Avenue Bonds. The bank officer referred several times to the criticism of collateral and the reason for his margin call, *i.e.*, the decrease in value of collateral, but the only collateral ever identified by price and changes in price and referred to by the bank officer was the Third Avenue Bonds.

The testimony leads to the inescapable conclusion that what the bank must have said to the petitioner was: you have a note due October 23, 1951, which will be renewed, provided, however, you take some mandatory action within the next four days (*i.e.* by Friday) to reduce the amount of your loans or provide additional collateral. We will not tell you the collateral we insist you sell, but Third Avenue Bonds are unsatisfactory to us because they have depreciated in market value from $7,250 to $5,200 (App. 94-5, 116, 117, 129).

What would any normal person have thought would be necessary to satisfy the bank? Obviously the bank was, in accordance with its policy, suggesting what the borrower ought to do, namely, to sell the bonds being criticized and apply the proceeds in reduction of the loan. It is noteworthy that the bank officer applied practically the entire amount (except $71) to the reduction of the loans (App. 120). He testified that if $5,000 were necessary he would not take and apply $5,200 (App. 128). The securities did not pass through the hands of petitioner nor did the proceeds (SEC Exs. 52A, B & C).

The entire transaction was initiated by the bank. The bank did not recall a single voluntary payment by peti-

tioner (App. 94-5). Consequently the transaction involved can in no sense be considered to have been a voluntary one.

The District Court which heard the evidence found that petitioner was guilty of no breach of fiduciary relationship, acted on no inside information, but if anything acted contrary to his own interest by selling when he should have held or bought (App. 145-6). Petitioner was given Hobson's choice. The bank gave him the option of allowing it to sell the collateral through its broker or permitting petitioner's broker to act. The District Court found the result, required by its interpretation, to be tragic. The intention of Congress, however, was to avoid such hardship. (Sen. Jud. Comm. p. 10, *supra*).

The mathematics of the trial court and Court of Appeals do not hold up on examination of *all* factors and mortgage demands. Not once does the District Court refer to the third note (Gans Exs. 22, 23) for $4,296. That Court said (App. 142):

> "On October 23, 1951, the date of the sale, claimant's secured loans totaled $17,200 and his collateral totalled $22,941.49 * * *."

Why is there no reference to the third note, which said on its face, as did the other two notes, that the bank had "a continuing lien and/or right of set off for the amount [of the loan] * * * upon any and all * * * securities" of the borrower?

Nowhere do the courts below refer to the demands for payment of the mortgagees or other creditors (Gans Exs. 24, 25, 26, 27).

It appears from the foregoing that the decision below was based upon a fundamental error in holding that "nevertheless Congress, in its wisdom, has tied the hands of the courts." 159 F. Supp. 441, 444. The testimony of Mr. Justice Douglas, then chairman of the Securities and

Exchange Commission, the testimony of Martin Riger, appearing for the Securities and Exchange Commission, and the Reports of Congress clearly and unequivocally deny that the hands of the courts are tied and can make no exception. Indeed, the Senate Judiciary Committee Proceedings specifically set forth the intention of Congress to grant power to the judge to prevent hardship and to do equity in an exceptional case by Section 249 as presently worded.

This is that exceptional case.

"A bankruptcy court is a court of equity, Sec. 2, 11 U. S. C., Sec. 11, and is guided by equitable doctrines and principles except insofar as they are inconsistent with the Act." *S. E. C. v. U. S. Realty & Improvement Co.*, 310 U. S. 434, 455 (1940).

"The traditional use of such writs (certiorari) both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so." Citing cases. *U. S. Alkali Export Ass'n v. U. S.*, 325 U. S. 196, 202, 65 S. Ct. 1120, 1124.

Reasons for Granting the Writ

I. The decisions of the Courts below conflict with the intention of Congress and the interpretation of the statute.

II. The purpose of the statute was to codify certain decisions of the Courts. The interpretation given the statute in this instance goes far beyond the cases referred to by the Securities and Exchange Commission in its advocacy of the section.

III. The Supreme Court has never interpreted and construed this section. Certiorari should be granted for that purpose.

IV. The scope and power of the Federal Courts are involved.

V. This is an important case in the administration of the Bankruptcy Law.

The power given to the Supreme Court to review cases in which the decision of the Court of Appeals is made final, "was intended to vest in this Court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that Court, and irrespective of any ruling or determination therein." *Forsyth* v. *Hammond Ind.*, 1897, 17 S. Ct. 665, 166 U. S. 506, 41 L. Ed. 1095.

The Supreme Court would grant certiorari to review a decision involving a federal question of substance not theretofore determined by the Supreme Court. *Brooklyn Sav. Bank* v. *O'Neil*, N. Y. 1945, 65 S. Ct. 895, 324 U. S. 697, 89 L. Ed. 1296, rehearing denied 65 S. Ct. 1189, 325 U. S. 893, 89 L. Ed. 2005.

The Supreme Court granted certiorari to review decision of Circuit Court of Appeals, holding claims of patent valid and infringed, notwithstanding there was no conflict of decisions with respect to claim involved, where the patent dominated a substantial portion of an industry so concentrated in one circuit that litigation in other circuits resulting in a conflict of decisions was unlikely. *Muncie Gear Works* v. *Outboard Marine & Manufacturing Co.*, 1942, 62 S. Ct. 865, 315 U. S. 759, 86 L. Ed. 1171.

The United States Supreme Court has jurisdiction of certiorari proceeding to review affirmance of judgment granting application of Securities and Exchange Commission to enforce and carry out a plan for dissolution of public utility holding company. *Otis & Co.* v. *Securities and Exchange Commission*, Del. 1945, 65 S. Ct. 483, 323 U. S. 624, 89 L. Ed. 511, rehearing denied 65 S. Ct. 710, 324 U. S. 887, 89 L. Ed. 1436.

A decision that a Chinese merchant, domiciled here for 17 years and with a large established business, must, on return from a visit to China, present a certificate required by the Chinese Exclusion Act, notwithstanding his offer of other satisfactory evidence of his status as a merchant, presents a question of such importance as to justify certiorari. *Ex parte Lau Ow Bew*, 1891, 12 S. Ct. 43, 141 U. S. 583, 35 L. Ed. 868. See also, *Lau Ow Bew* v. *U. S.*, Cal. 1892, 12 S. Ct. 517, 144 U. S. 47, 36 L. Ed. 340.

Where District Court and Circuit Court of Appeals held themselves bound by a Supreme Court decision, and on the facts found held as matter of law that a staging was seaworthy despite its defects, and that injured seaman was not entitled to indemnify under the maritime law, such conclusion of law was reviewable by the Supreme Court. *Mahnich* v. *Southern S.S. Co.*, Pa. 1944, 64 S. Ct. 455, 321 U. S. 96, 88 L. Ed. 561.

The rule that concurrent findings of fact by two Courts below will not ordinarily be disturbed, will not be applied strictly. *Thomson Spot Welder Co.* v. *Ford*, Mich. 1924, 44 S. Ct. 533, 265 U. S. 445, 68 L. Ed. 1098.

Review in appellate proceeding extends to findings of fact as well as to rulings on questions of law. *Panama Mail S. S. Co.* v. *Vargas*, Cal. 1930, 50 S. Ct. 448, 281 U. S. 670, 74 L. Ed. 1105.

The concurrent findings of fact of the District Court and Circuit Court of Appeals are persuasive proof in support of their judgments, but the rule does not relieve the Supreme Court of the task of examining the foundation for findings in a particular case. *Baumgartner* v. *U. S.*, Mo. 1944, 64 S. Ct. 1240, 322 U. S. 665, 88 L. Ed. 1525.

Certiorari has been granted by this Court "to effectuate the present Congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers* v. *Missouri Pacific Railroad Co.* (1957) 77 S. Ct. 443, 450, 352 U. S. 509.

It is as important that fees for attorney's meritorious services be allowed which actually were rendered in and necessary to effectuate reorganization as that the Court should prevent undue enrichment. *In Re Public Gas & Coke* (1942) 48 F. Supp. 646, 647; *In Re Irving-Austin Bldg. Corp.* (1939) 100 F. 2d 574, 579; *In Re Watco Corp.* (1938) 95 F. 2d 249, 251.

In Re Colonial Utilities (1940) 34 F. Supp. 223 was a reorganization proceeding in which one Betts became counsel for the indenture trustee in October 1938. In December 1938 he sold $5,000 of 6% notes of the debtor and in October 1939 sold $5,000 5½% bonds of the debtor. Both notes and bonds had been purchased long before his selection as counsel to the indenture trustee (p. 224). The Court held that counsel was not barred from compensation under section 249 even though he was attorney for the successor trustee. The indenture provided that his compensation was secured by a lien on the property pledged to secure the principal debt and good faith and honorable dealings required the Court to give effect to that pledge, it held (34 F. Supp. 224).

In Re Northern Redwood Lumber Co. (1942) 43 F. Supp. 15, was a reorganization proceeding commenced under Section 77B of the Bankruptcy Act. Two years later, Chapter X of the Bankruptcy Act was enacted. Chapter X, section 275, 11 U. S. C. A. Sec. 676, sub. c, provides that Chapter X is applicable to all proceedings where the petition for reorganization was approved within three months prior to the effective date of Chapter X (i.e. September 22, 1938), or if such petition was approved more than three months before the effective date of Chapter X then the provisions of said chapter should apply to the reorganization proceedings to the extent that the judge shall deem their application practicable (p. 17).

A member of the bondholders' committee purchased $4,000 principal amount of the debtor's bonds on December

30, 1938, subsequent to the enactment and the effective date of Chapter X (p. 16). Nevertheless, the Court held it would not make an order finding section 249 of Chapter X applicable since the original petition was approved more than three months prior to September 22, 1938. The Court held that it would be neither fair nor equitable to make section 249 applicable and thus bar the bondholders' committee member from compensation. The Court allowed him compensation and expenses (43 F. Supp. 17).

As a matter of law, it is clear that in appropriate circumstances a sale by a pledgee may constitute a transfer for the account of the claimant within the meaning of Section 249. *In re Cosgrove-Meehan Coal Corp.*, 136 F. 2d 3 (3rd Cir. 1943), cert. denied 320 U. S. 777, a bank loan for which the attorney-claimant "was personally obligated was called and his one-third interest in the one hundred bonds of the debtors, pledged as security for the loan, was sold by the pledgee" (136 F. 2d 5). The Court noted that "the sale appear[ed] to have been necessary" because "at that time, a drop of an additional point in the market value of the bonds would have rendered the collateral insufficient to liquidate the loan" (*Ibid.*). The claimant in that case did not seek approval of the transfer, but the Court of Appeals observed that he "could • • • have applied for the Court's approval of *his own* or his pledgee's antecedent sales of bonds of the debtor" (136 F. 2d at 6). (Emphasis ours.)

Otis & Co. v. *Insurance Building Corporation*, 110 F. 2d 333 (1940) was a case where Otis & Co. acted as "agent and representative" of the bondholders of the debtor and functioned as a bondholders' protective committee. The proceeding commenced June 3, 1938. In October 1938, Otis & Co. took over from one of its affiliates $12,000 of the debtor's bonds at cost. On September 14, 1938, it sold some and between December 2nd and December 5, 1938, it sold the balance of the bonds. Between December 12, 1938, and March 24, 1939, Otis & Co. purchased and sold $12,500

additional bonds. The Court found no doubt that Otis & Co acted in good faith but it had made "usual, voluntary purchases and sales" which are barred. The Court said (110 F. 2d 335):

> "No change has been made in that part of the Section which refers to the purchases and sales. Any such must be reported if the fiduciary asks for compensation. *If they are the usual, voluntary purchases and sales, occurring during the proceeding after acceptance of the trust*, allowance of compensation is prohibited without qualification. The existence of good or bad faith, the fact that there is, on the face of the transaction, a profit or a loss, is immaterial. No approval by the judge can alter the situation. It is doubtless true that the statute, thus construed, may work a hardship in some cases —as in this; but such sporadic cases are inconsiderable compared to the large object sought to be achieved by the law, which is to fix a standard of conduct by persons acting in fiduciary capacities, in these cases, so high as to prevent any possible clash between selfish interest and faithful performance of duty.
>
> As a matter of fact, very much the same standard was established by the courts before the recent amendment to the bankruptcy law was passed. Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076; Magruder v. Drury, 235 U. S. 106, 119, 35 S. Ct. 77, 59 L. Ed. 151; In re Paramount-Publix Corp., D. C., 12 F. Supp. 823, 828." (Emphasis ours.)

In Re Norwalk Tire & Rubber Co., 96 F. Supp. 274 (1951). The Court denied compensation to the secretary of a debenture holders' committee because of voluntary dealings by his principal in securities of the debtor during reorganization. Four transactions comprising sales and purchases on its own account of debentures were involved. The transactions were for the convenience of the principal's customers. The record was entered in the principal's name only by the inadvertence of a clerk notwithstanding strict instructions that no transaction should be handled for the principal. As agent the principal had also handled 11

other transactions aggregating $23,000 face amount. The Court stated its personal inclination was to avert a real hardship by accepting the suggestions of counsel that these inadvertences should be disregarded under the doctrine of *de minimis*. However, on these facts and in the absence of precedent, the Court found Section 249 left no judicial discretion and should be given rigid application.

In *In Re Midland United Co.*, 159 F. 2d 340 (1947), the issue was whether an attorney for a protective committee was disqualified from compensation for services "by reason of purchases by him and his wife of the securities of subsidiaries of the debtor, during the course of the reorganization" (159 F. 2d 341). The District Court had held that an attorney for a protective committee was barred, as a fiduciary, from compensation (a) by the law of trusts and (b) by the Chandler Act where he or a member of his immediate family "*deals* in securities of subsidiaries or affiliates of a corporate debtor in reorganization" (p. 341) (emphasis ours). In this case Midland Utilities Company, a registered holding company, filed a petition for reorganization under Section 77B of the Bankruptcy Act. Of "primary significance" (p. 341) is the fact that among principal assets of Midland Utilities were stockholdings of other utility enterprises which were thus subject to prior claims of public holders of bonds and preferred stock. The attorney for the committee (Magill Committee) bought 100 shares of preferred stock of a subsidiary in 1936 and 1937 and held them until redemption in 1944. His wife owned some debentures and preferred stock prior to the reorganization proceeding and engaged in five separate transactions during the proceeding (p. 342). While the wife made the purchases entirely with her own funds, the attorney testified that she engaged in the various transactions with his "entire approval and knowledge" (p. 342). The Court refers to several cases under Section 77B of the Bankruptcy Act and Chapter X of the Chandler Act holding that compensation for services should be denied where an

actual conflict of interest exists (p. 344). The Court found that Section 249 is not inconsistent with Section 77B, 11 U. S. C. A. Sec. 207 sub. c(9) or the Chandler Act (p. 344). The Court held that Section 249 does not limit its jurisdiction under Sections 241, 242, 243 (p. 344).

The Court cites the ruling of the Supreme Court in *Porter* v. *Warner Holding Co.*, 66 S. Ct. 1086, 1089, that the inherent equitable power of the District Court is not to be denied or limited in the absence of a clear and valid legislative command and "unless a statute in so many words or by a necessary and inescapable inference, restricts the Court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The correct principles of equity securing complete justice, should not be yielded to light inferences or doubtful construction'. Citing cases."

The Court held (p. 345) that the stricter rule of Section 249 against "*trading* in the stock of the debtor even where no conflict existed" (emphasis ours) could not be extended to cover stock of subsidiaries or affiliates "in the absence of a conflict of interest" (p. 345). The Court found, however, that counsel and his wife bought beneficial interests in claims against the debtor by buying the securities of a subsidiary having claims against the parent (p. 345). The Court held that independent of Section 249 counsel was barred from compensation "where actual conflict of interest exists" (p. 346). The Court then found that such a conflict did exist. It also appeared in this case that one of appellants' law partners purchased securities of the subsidiaries as did two trust estates of which applicant counsel was a co-trustee. He was barred from any award.

In *In Re Central States Electric Corp.* (1953), 112 F. Supp. 29, appeal denied 206 F. 2d 70, cert. den. 74 S. Ct. 225, 346 U. S. 899, the Court considered *dealings* by attorneys who served as counsel for debtors 7% Preferred

Stockholders' Committee and who personally and also through their immediate families "*dealt*" in stock of debtor's subsidiaries during the proceeding, and held they were *not* precluded thereby from receiving compensation in the absence of any suggestion that either the 7% Preferred Stockholders or debtor's estate as a whole had been prejudiced in any manner by the transactions (headnote 6, p. 282). The Court discusses the activities of attorneys for the Committee who voluntarily purchased and sold shares of the debtor's subsidiaries. In two instances their wives also purchased securities. The Securities and Exchange Commission contended allowances to such attorneys were barred by Section 249. The Court did not agree (p. 287). It found there is nothing inherently wrong in dealing in securities and claims so long as the estate does not suffer as a consequence (p. 287).

> "In the present case there is no indication or suggestion that either the 7% preferred stockholders or the estate of the debtor as a whole has been prejudiced in any manner by these transactions. At the same time it is clear that the 7% stock has been brought from an almost hopeless situation largely by the activities of the representatives of those holding it. While it is the better policy to refrain from dealing in such securities, it is my opinion that to deprive these applicants of justly earned compensation under the facts here existing would result in unwarranted hardship.
>
> I shall therefore allow compensation to those above named as later set forth." (112 F. Supp. 287)

The Court then allowed $250,000 to such counsel (p. 290). This award was not disturbed by either the Court of Appeals or the Supreme Court of the United States, which denied leave to appeal and certiorari respectively.

None of the cases which received comment in the briefs or opinions below parallel the situation in the case of the petitioner.

Silberger v. *Prudence Bonds* (1950) 180 F. 2d 917, cert. den. 71 S. Ct. 37, 40, 340 U. S. 813, 831; *Inland Gas* (1947) 73 F. Supp. 785; *Finn* v. *Childs* (1950) 181 F. 2d 431, 441; *Equitable Office Bldg.* (1949) 83 F. Supp. 531, rev'd other grounds 175 F. 2d 218; *Mountain States Power* (1940) 35 F. Supp. 307, mod. other grounds 118 F. 2d 405.

All were cases of *voluntary dealings* and *trading* in securities. The usual purchases and sales were involved in each case. The involuntary character of the single transaction which is the crux of this petition and case was lacking in all those cases.

Conclusion

The writ of certiorari should be granted. The decisions below overlooked the legislative history clearly showing the meaning of Section 249 and the intention of Congress. The Courts' hands were not tied by Congress. Finally, this Court should pass upon and construe that section in the light of the facts in this case and for cases where manifest hardship and injustice may result by reason of such improper interpretation.

Dated: September 4, 1959.

Respectfully submitted,

HIRAM S. GANS,
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APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 263—October Term, 1958

Argued April 15, 1959 Decided May 11, 1959

Docket No. 25474

SURFACE TRANSIT INC., ET AL.,

Appellants,

v.

SAXE, BACON & O'SHEA, ET AL.,

Appellees.

In re Allowances in

ESTATE OF THIRD AVENUE TRANSIT CORPORATION,

Debtor.

Before:

CLARK, *Chief Judge*, and
SWAN and MOORE, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, Judge.

Surface Transit, Inc. and others appeal from orders making final allowances to counsel in the reorganization proceedings of Third Avenue Transit Corporation and its subsidiaries. Orders affirmed, modified, or reversed in accordance with the opinion.

CLARK, *Chief Judge:*

This is the final round in the Chapter X reorganization of the Third Avenue Transit Corporation, a common carrier of passengers, and its subsidiaries instituted by the filing of an involuntary petition on October 25, 1948. The debtor at that time was enmeshed in what seemed to be insoluble problems involving limitations on the fares it could charge, heavy wage demands of its employees, and franchise tax demands of New York City. The parties to this appeal are in near unanimity that the reorganization was unusually successful in achieving a workable solution of these problems and in creating reorganized companies of considerable financial strength.[1] Amidst this genuine show of success it is indeed difficult for any court or agency dispassionately to evaluate the several applications for compensation filed below. For nearly all the participants richly merit the heartfelt thanks of the court and the public, as well as those of the particular group or interest their efforts may have more directly benefited (266 F. 2d 864-5).

* * *

There remain to be considered the appeal of Hiram S. Gans from Judge Dimock's decision, D. C. S. D. N. Y., 159 F. Supp. 440, disqualifying him from all compensation by virtue of § 249 of the Bankruptcy Act, 11 U. S. C. § 649, and the S. E. C.'s objection to Judge Dimock's refusal to disqualify the firm of Baker, Obermeier & Rosner under the same statute. Gans, an active participant in this proceeding from its inception in August 1948, was counsel to an adjustment bondholders' committee and was instrumental

---

[1] The affairs of this debtor have been before the court in many aspects. See, e.g., *In re Third Avenue Transit Corp.*, 2 Cir., 192 F. 2d 971; *In re Third Avenue Transit Corp.*, 2 Cir., 198 F. 2d 703; *In re Third Avenue Transit Corp.*, 2 Cir., 222 F. 2d 466; *In re Third Avenue Transit Corp.*, 2 Cir., 230 F. 2d 425; *In re Third Avenue Transit Corp.*, 2 Cir., 233 F. 2d 310; *In re Third Avenue Transit Corp.*, 2 Cir. 238 F. 2d 665, certiorari denied *Woolfson* v. *Doyle*, 352 U. S. 1031; *Johnson Fare Box Co.* v. *Doyle*, 2 Cir., 250 F. 2d 656.

in bringing in Fifth Avenue Coach Lines as purchasers of the reorganized companies. In October 1951 in response to a margin call by his pledgee he sold for $5,271.14 certain Third Avenue bonds which he had owned at the inception of his participation in the reorganization and had pledged in March 1951 along with other securities as collateral for a loan.

Section 249 bars an allowance to any person who while acting in a fiduciary or representative capacity in the reorganization proceedings "has purchased or sold" stock of or claims against the debtor, "or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred". Concededly the power of the court to consent or to approve a transaction extends only to those transactions embraced in the second of the above quoted phrases and does not extend to the first described transfers. *Otis & Co.* v. *Insurance Bldg. Corp.*, 1 Cir., 110 F. 2d 333. It would seem that any disposal of securities of the debtor pursuant to a pledge arrangement instituted after the applicant had assumed a representative or fiduciary capacity in a reorganization must fall within the class of transactions absolutely prohibited. Sale by the pledgee is of course pursuant to a power of sale granted by the owner; and such a pledge may often operate in practical effect as a "stop loss order"—an order to a broker to sell if the market value of the securities drops below a specific price. If one exercising the perquisites and receiving the benefits of ownership can thus easily avoid the statutory bar by the form chosen for the particular transaction, its deterrent effect is largely dissipated.

Alternatively Judge Dimock's finding that Gans could have met his pledgee's margin call without selling any of the Third Avenue Bonds had he chosen to do so is amply sustained. At that date he was indebted to the pledgee for a total of $21,496 (including $4,296 on a personal note to

which this collateral was technically also subject). The value of the other securities pledged as collateral for these loans totaled $17,691.49; it also affirmatively appears in the record that Gans then owned additional Third Avenue Bonds and Mexican Railway bonds of substantial value. Clearly from these resources Gans by further pledge or other sales could have avoided a sale of any of his Third Avenue securities. Under these circumstances the court could not properly approve the transaction, since the decision to sell was clearly Gans' own, not the pledgee's.

This result may well work harshly in individual cases as here. But in § 249 of the Bankruptcy Act Congress clearly intended drastic results and thought them necessary to eliminate the serious abuses of insider information which had long been existent in equity reorganizations. See 6 Collier on Bankruptcy § 13.18 (1947). In the past excuses of inadvertence or *de minimis* have not been permitted to undermine the section, and we do not feel we can narrowly constrict it here. *Cf. Otis & Co.* v. *Insurance Bldg. Corp., supra*, 1 Cir., 110 F. 2d 333; *In re Norwalk Tire & Rubber Co.*, D. C. Conn., 96 F. Supp. 274, 276.

* * *

And affirming the denial of an allowance to Hiram S. Gans, we reverse the award to Baker, Obermeier & Rosner. In other respects the orders are affirmed (266 F. 2d 867-8).

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BRIEF FOR RESPONDENTS

SURFACE TRANSIT INC., ET AL.

IN OPPOSITION TO

PETITION FOR

CERTIORARI

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FILED
OCT 2 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 382

HIRAM S. GANS,

Petitioner,

v.

SURFACE TRANSIT, INC., ET AL.,

Respondents.

BRIEF FOR RESPONDENTS, SURFACE TRANSIT, INC., ET AL., IN OPPOSITION TO PETITION FOR CERTIORARI

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CASES CITED

Otis & Co. v. *Insurance Bldg. Corp.*, 110 F. 2d 333 (1 CA 1940)	5, 7, 8
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BRIEF FOR RESPONDENTS, SURFACE TRANSIT, INC., ET AL., IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

Petitioner, Hiram S. Gans, counsel for the Brown Committee for Adjustment Mortgage Income Bondholders in the Chapter X reorganization of the Third Avenue Transit System, requests this Court to review the evidence and the facts and circumstances which led the Court of Appeals, Second Circuit, to affirm, unanimously, the decision of the District Court, which denied Petitioner any allowance for his services (*In re Third Avenue Transit Corp.*, 159 Fed. Supp. 440, S. D. N. Y. 1958).

The District Court had denied the award to the Petitioner, Gans, because the Court found that on October 23, 1951 during the course of the reorganization and while acting for the Bondholders' Committee, Gans

had sold $25,000 face amount of Adjustment Mortgage Bonds of the debtor in violation of Section 249 of the Bankruptcy Act (11 U. S. C. § 649; 52 Stat. 901). The District Court also denied, at the same time, an application by Gans for subsequent approval of his sale of the debtor's Bonds.

Gans appealed from the order of the District Court denying him compensation; but the Court of Appeals affirmed the District Court (*Surface Transit, Inc., et al.* v. *Saxe, Bacon & O'Shea et al.*, 266 F. 2d 862 (2 CA 1959) at pp. 867-868).

The reorganized companies as appellants in the Court of Appeals argued that if the Petitioner, Gans, should ultimately secure an allowance, such allowance should be apportioned within the total of allowances ultimately made to other claimants—whether that total be the $2,068,000 awarded by the District Court or the total as reduced on appeal; and that, in no event, should any allowance which might be awarded to Gans be added to such total. The Court of Appeals made reductions in specific allowances totalling $219,500, and thus reduced the total of allowances to all claimants from $2,068,000 to $1,848,500.

In our brief in opposition to the petition for certiorari (No. 285) of Saxe, Bacon & O'Shea, attorneys for the trustees in the reorganization of Third Avenue Transit System, we have set forth pertinent facts bearing upon the allowances made to 45 claimant committees, individuals and attorneys, aggregating $2,068,000 (pp. 2-8). These background facts are necessary to an adequate understanding of the present petition and to avoid needless repetition we respectfully refer the Court to them.

The Facts

I

A detailed recital of the evidence relating to Petitioner's claim is unnecessary, since the District Court has found and set forth the salient facts in its opinion, as follows (Gans App. p. 142*):

> "The claimant pledged the Third Avenue bonds in question as collateral for a bank loan in March, 1951. On October 23, 1951, the date of the sale, claimant's secured loans totaled $17,200 and his collateral totaled $22,941.49, an amount which failed in a slight degree to meet the requirement of the bank that the value of the collateral should be such that the loan should not exceed 70% of it. The bank demanded either a reduction of the loan or additional collateral. It expressed concern over the quality of the collateral, particularly the Third Avenue bonds which had declined in value from $7,343.75 on March 22, 1951 to $5,250 on October 19, 1951. The claimant thereupon requested the bank to forward the Third Avenue bonds to his broker for sale and requested his broker to forward the proceeds of the sale directly to the bank. Thereby the loan was reduced by the proceeds of sale, $5,250. The claimant could have avoided sale of the Third Avenue bonds if he had sold all of the other pledged securities, valued on the date of sale at $17,691.49. That sum would have paid the loan in full and left the claimant the owner of the bonds. Claimant has argued that a forced sale of the bonds would have been inevitable if he had not sold them; but that argument is not supported by facts.
>
> * * *

* "Gans App."—Appendix to Brief of Appellant Gans in the Court of Appeals.

". . . The bonds were sold on his order and therefore they were sold by him. (Gans App. 143)

* * *

". . . The transfer in this case, however, was clearly a sale. (p. 144)

* * *

"In this case, however, I cannot escape the fact that a sale of the remaining collateral by the claimant would have avoided a sale of the Third Avenue bonds by the pledgee. Their sale by the pledgee was not inevitable." (p. 144)

II

The Court of Appeals also detailed the pertinent facts, in its opinion, as follows (Pet. App. 28*):

". . . Gans, an active participant in this proceeding from its inception in August 1948, was counsel to an adjustment bondholders' committee and was instrumental in bringing in Fifth Avenue Coach Lines as purchasers of the reorganized companies. In October 1951 in response to a margin call by his pledgee he sold for $5,271.14 certain Third Avenue bonds which he had owned at the inception of his participation in the reorganization and had pledged in March 1951 along with other securities as collateral for a loan. (pp. 28-29)

* * *

"Alternatively Judge Dimock's finding that Gans could have met his pledgee's margin call without selling any of the Third Avenue Bonds had he chosen to do so is amply sustained. At that date he was indebted to the pledgee for a total of $21,496 (including $4,296 on a personal note to which this collateral was technically also subject). The value of the other securities pledged as col-

* "Pet. App."—Appendix to Gans' Petition for Certiorari.

lateral for these loans totaled $17,691.49; it also affirmatively appears in the record that Gans then owned additional Third Avenue Bonds and Mexican Railway bonds of substantial value. Clearly from these resources Gans by further pledge or other sales could have avoided a sale of any of his Third Avenue securities. Under these circumstances the court could not properly approve the transaction; since the decision to sell was clearly Gans' own, not the pledgee's." (pp. 29-30)

POINT FIRST

The decision of the Court of Appeals, affirming the District Court, was clearly correct.

As the District Court pointed out a claimant under § 249 of the Bankruptcy Act is disqualified from compensation in two classes of transactions in securities of the debtor:

1. If the securities have been purchased or sold by the claimant.

2. If the securities have been otherwise acquired or transferred by the claimant or for his account.

In the second class of transactions, however, the claimant is disqualified only if the acquisition or transfer is "without the prior consent or subsequent approval of the judge."

But the District Court found that the bonds had been *sold on Gans' order*, and therefore were *sold by him* and fell within the first class. Accordingly, citing *Otis & Co. v. Insurance Bldg. Corp.*, 1 Cir., 110 F. 2d 333, the Court held: "the prior consent or subsequent approval of the judge will not avert disqualification." (Gans App. 143)

Explaining its views as to the second class of security transactions referred to above, the Court illuminatingly said (Gans App. 143):

> "The transaction falls within the *second class* if the securities have been acquired or transferred by the claimant or for his account otherwise than where they have been purchased or sold by him. The description in the statute, 'otherwise acquired or transferred', refers back to the first class and therefore is to be construed as if it read 'acquired or transferred otherwise than where the securities have been purchased or sold by the claimant'. Thus a transaction will fall within this description (a) if it is not a purchase or a sale or (b) even though a purchase or a sale, if it is not a purchase or sale *by the claimant* but is merely for his account without any action by him." (Emphasis added)

Speaking of the rigorous but salutary public policy behind § 249 of the Bankruptcy Act, the District Court said (Gans App. 145):

> "... So strong is the public policy against dealings by persons engaged in the reorganization of a corporation in the securities of that corporation that the courts are not allowed to remunerate from the estate one of them who buys or sells any of those securities."

The Court clearly recognized the hardship in the case before it, but nevertheless held (Gans App. 144-145):

> "Circumstances creating financial hardship in the retention of the securities, no matter how appealing, cannot be ground for holding their sale on the order of the claimant to have been, not a sale by him, but merely a transfer for his account. To reach that result the circumstances must be such as

to force their sale. I must therefore deny the application for approval and with it the application for compensation."

II

The Court of Appeals unanimously affirmed the views and the holding of the District Court saying (Pet. App. pp. 29, 30):

"Section 249 bars an allowance to any person who while acting in a fiduciary or representative capacity in the reorganization proceedings 'has purchased or sold' stock of or claims against the debtor, 'or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred'. Concededly the power of the court to consent or to approve a transaction extends only to those transactions embraced in the second of the above quoted phrases and does not extend to the first described transfers. *Otis & Co. v. Insurance Bldg. Corp.*, 1 Cir., 110 F. 2d 333. It would seem that any disposal of securities of the debtor pursuant to a pledge arrangement instituted after the applicant had assumed a representative or fiduciary capacity in a reorganization must fall within the class of transactions absolutely prohibited. Sale by pledgee is of course pursuant to a power of sale granted by the owner; and such a pledge may often operate in practical effect as a 'stop loss order'—an order to a broker to sell if the market value of the securities drops below a specific price. If one exercising the perquisites and receiving the benefits of ownership can thus easily avoid the statutory bar by the form chosen for the particular transaction, its deterrent effect is largely dissipated.

* * *

"... But in § 249 of the Bankruptcy Act Congress clearly intended drastic results and thought them necessary to eliminate the serious abuses of insider information which had long been existent in equity reorganizations. See 6 Collier on Bankruptcy § 13.18 (1947)."

Petitioner resorts to the legislative history of § 249 of the Bankruptcy Act, in an effort to establish that the section should have been given the construction for which he contends. But his arguments are shown to be without merit by the Court of Appeals, First Circuit, in its analysis of the pertinent legislative history in *Otis & Co.* v. *Insurance Bldg. Corp.*, 110 F. 2d 333, 335 (1940). With those views, the Court of Appeals, Second Circuit, in this case, obviously concurs (Pet. App. 30).

POINT SECOND

The Court below correctly interpreted § 249 of the Bankruptcy Act; the questions presented involve, essentially, evidentiary matter peculiar to this particular case; and there are no questions of general or public importance meriting review by this Court.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: New York, N. Y.
October 1, 1959